

**Nomination of
Steven C. Seeger, to be United States District Judge for the Northern District of Illinois**

Submitted August 29, 2018

QUESTIONS FROM SENATOR WHITEHOUSE

All judicial nominees listed above are directed to answer each of the following questions:

1. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying “[m]y job is to call balls and strikes and not to pitch or bat.”
 - a. Do you agree with Justice Roberts’ metaphor? Why or why not?

Yes. No metaphor is perfect – but this one captures some of the essential attributes of a good judge.

The role of a judge is to apply neutral rules to both sides in an impartial manner. A judge is not supposed to root for either party, or change the rules to help either side. Instead, the adversary process – that is, pitching and batting by the litigants themselves, based on ground rules set in advance – should decide the outcome of the case.

A judge, like an umpire, needs to make judgment calls. But the strike zone should not change, depending on who is at bat.

An umpire does not wear a jersey – instead, he or she wears black to display independence. So too, a judge wears a black robe to signify that he or she plays a neutral role, and will not allow his or her policy preferences to affect the outcome of a case.

- b. What role, if any, should the practical consequences of a particular ruling play in a judge’s rendering of a decision?

Judges should be mindful of the practical consequences of their decisions, and always remember that they affect real people in the real world.

Judges can consider the practical consequences of their decisions in a variety of settings. For example, discovery rulings routinely take into account the real-world impact on the parties. As a second example, district courts consider a defendant’s ability to pay when setting civil penalties in SEC cases. As a final example, district courts should take practical considerations into account during sentencing. *See* 18 U.S.C. § 3553(a)(1); *Gall v. United States*, 552 U.S. 38, 52 (2007).

That said, judges must remain impartial in all cases, without showing favoritism to either side. *See* 28 U.S.C. § 453.

2. During Justice Sotomayor’s confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy.
 - a. What role, if any, should empathy play in a judge’s decision-making process?

Empathy is an important part of being a decent human being. Judges are no exception.

As a general matter, judges must apply the law in an impartial manner, without favoring either side. Judges cannot allow favoritism to affect their decision-making. Courts should interpret statutes based on the text and precedent, not based on empathy to one side or the other.

That said, empathy does come into play in certain situations, such as discovery and other day-to-day matters in district court. For example, I once moved to reschedule the deposition of a CEO because his mother was in the final stages of cancer. *See* Fed. R. Civ. P. 26(c)(1) (empowering district courts to protect litigants from “annoyance, embarrassment, [or] oppression” during discovery). In another case, I agreed to reschedule a trial because the defendant was suffering from heart issues.

Empathy involves the ability to understand and appreciate where someone else is coming from. At sentencing, it is important for a district court judge to consider the full picture of the defendant, including the life circumstances that led to the crime.

- b. What role, if any, should a judge’s personal life experience play in his or her decision-making process?

A judge can draw upon his or her own life experiences when making a variety of decisions, such as discovery and evidentiary rulings.

A judge also can consider the common usage of language – that is, how ordinary people use words in the real world – when interpreting statutes. *See, e.g., Lockhart v. United States*, 136 S. Ct. 958, 969 (2016) (Kagan, J., dissenting) (“Imagine a friend told you that she hoped to meet ‘an actor, director, or producer involved with the new Star Wars movie.’ You would know immediately that she wanted to meet an actor from the Star Wars cast—not an actor in, for example, the latest *Zoolander*.”); *Murphy v. NCAA*, 138 S. Ct. 1461, 1474 (2018) (Alito, J.) (“A State is not regarded as authorizing everything that it does not prohibit or regulate. No one would use the term in that way. For example, no one would say that a State ‘authorizes’ its residents to brush their teeth or eat apples or sing in the shower.”); *Smith v. United States*, 508 U.S. 223, 243 (1993) (Scalia, J., dissenting) (“When someone asks, ‘Do you use a cane?,’ he is not inquiring whether you have your grandfather’s silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane. Similarly, to speak of ‘using a firearm’ is to speak of using it for its distinctive purpose, *i.e.*, as a weapon.”).

3. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

No.

4. What assurance can you provide this Committee and the American people that you would, as a federal judge, equally uphold the interests of the “little guy,” specifically litigants who do not have the same kind of resources to spend on their legal representation as large corporations?

For over eight years, I have worked in the Enforcement Division of the SEC. Every day, I work to protect retail investors – the proverbial “little guy” – from fraudsters who would do them harm. Protecting individuals is a bread-and-butter part of my job as an enforcement attorney.

Under the Federal Rules of Civil Procedure, district court judges have all sorts of tools to ensure that individuals receive a fair hearing, even if they are out-resourced. In fact, the very first Rule requires courts to secure the “just, speedy, and inexpensive” determination of every case. *See* Fed. R. Civ. P. 1. Courts must take an active role to ensure that discovery is “proportional to the needs of the case.” *See* Fed. R. Civ. P. 26(b)(1). Rule 26 expressly requires district courts to consider the “parties’ resources.” *Id.*; *see also* Fed. R. Civ. P. 26(c)(1) (empowering district courts to protect litigants from “undue burden or expense”); Fed. R. Civ. P. 26(c)(1)(B) (empowering district courts to control the “allocation of expenses” of discovery).

5. Do you believe that discrimination (in voting access, housing, employment, etc.) against minorities—including racial, religious, and LGBT minorities—exists today? If so, what role would its existence play in your job as a federal judge?

Yes, discrimination against minorities still exists. I would stay vigilant and make every effort to ensure that discrimination does not enter my courtroom and taint the outcome of the case. I also would ensure that litigants who bring discrimination claims receive a fair hearing, and I would fully and faithfully apply the law in that area.

Senator Mazie K. Hirono
Questions for the Record for Steven C. Seeger

In law school, you wrote a law review note advocating for a particular test—the “religious motivation test”—when interpreting the substantial burden requirement of the Religious Freedom Restoration Act of 1993 (RFRA). You argued that the religious motivation test was consistent with the intended broad scope of RFRA. In 2005, you assisted with an amicus brief to the Supreme Court supporting the display of a statue of the Ten Commandments in two Ohio courthouses.

Over the past few years, we have seen businesses try to use the First Amendment’s Free Exercise Clause to defend discrimination (e.g., refusing service to LGBTQ individuals) and to deny people their constitutionally-protected rights (e.g., refusing to provide coverage for contraception).

What is your understanding of how the First Amendment’s Free Exercise Clause relates to other constitutional rights and the First Amendment’s Establishment Clause?

The relationship between the Free Exercise Clause and other important civil rights (such as laws against discrimination) is the subject of active, ongoing litigation. As the Supreme Court recently recognized in *Masterpiece Cakeshop*, the “outcome of cases like this in other circumstances must await further elaboration in the courts.” See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 136 S. Ct. 1719, 1732 (2018) (Kennedy, J.). Such disputes must be resolved “with tolerance,” without “disrespect to sincere religious beliefs,” and without “subjecting gay persons [or anyone else, for that matter] to indignities when they seek goods and services in an open market.” *Id.* The interplay between religious rights and other civil rights is the focus of proposed legislation, too. See, e.g., Do No Harm Act (S. 2918). Under the Judicial Code of Conduct, it would not be appropriate for a judicial nominee to comment on impending litigation or proposed legislation.

There is a substantial body of precedent about the relationship between the Free Exercise Clause and the Establishment Clause. If confirmed, I would faithfully apply all such precedent from the Supreme Court and the Seventh Circuit.

The Free Exercise Clause and the Establishment Clause share a common goal of protecting liberty. The Religion Clauses must be “read together . . . in light of the single end which they were designed to serve,” namely, “to promote and assure the fullest possible scope of religious liberty and tolerance for all.” *School Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

The Supreme Court has recognized that there can be tension between the Free Exercise Clause and the Establishment Clause. See, e.g., *Hosana-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 181 (2012) (“We have said that these two Clauses ‘often exert conflicting pressures’ . . . and that there can be ‘internal tension . . . between the Establishment Clause and the Free Exercise Clause.’”) (citations omitted; ellipsis in original); *Locke v. Davey*, 540 U.S. 712, 718 (2004) (“These two Clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension.”); *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) (“While the two Clauses express complementary values, they often exert conflicting pressures.”); *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 719 (1981) (acknowledging the “tension” between the

two Clauses).

Yet the Supreme Court has also acknowledged that there is room for “play in the joints” between them. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017); *Locke*, 540 U.S. at 718; *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 669 (1970). “This Court has long recognized that the government may . . . accommodate religious practices . . . without violating the Establishment Clause.” *See Cutter*, 544 U.S. at 713 (ellipsis in original) (Ginsburg, J.). But “[a]t some point, accommodation may devolve into ‘an unlawful fostering of religion.’” *Id.* (citation omitted).

**Nomination of Steven C. Seeger
United States District Court for the Northern District of Illinois
Questions for the Record
Submitted August 29, 2018**

QUESTIONS FROM SENATOR BOOKER

1. According to a Brookings Institute study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.¹ Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.² These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.³ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.⁴

a. Do you believe there is implicit racial bias in our criminal justice system?

Yes.

b. Do you believe people of color are disproportionately represented in our nation's jails and prisons?

Yes.

c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

Before my nomination, I had not studied the issue of implicit racial bias in detail. That said, a few years ago, I read *Blink* by Malcolm Gladwell, which examined the role that the unconscious plays in everyday decision-making. He discussed unconscious attitudes about race as measured by the Implicit Association Test. I also read Daniel Kahneman's *Thinking, Fast and Slow*, which explored and explained the profound effect of unconscious cognitive biases.

¹ JONATHAN ROTHWELL, HOW THE WAR ON DRUGS DAMAGES BLACK SOCIAL MOBILITY, BROOKINGS INSTITUTE (Sept. 30, 2014), available at <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/>.

² *Id.*

³ ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016), available at <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

⁴ *Id.* at 8.

2. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell an average of 14.4 percent.⁵ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.⁶

- a. Do you believe there is a direct link between increases of a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I have not studied this issue, so I do not have an opinion.

- b. Do you believe there is a direct link between decreases of a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

I have not studied this issue, so I do not have an opinion.

3. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

Yes.

4. The color of a criminal defendant plays a significant role in capital punishment cases. For instance, people of color have accounted for 43 percent of total executions since 1976 and 55 percent of those currently awaiting the death penalty.⁷

- a. Do those statistics alarm you?

Yes.

- b. Do you believe it is cruel and unusual to disproportionately apply the death penalty on people of color in compared to whites? Why not?

Racial biases have no place in the criminal justice system. The color of a person's skin should have no bearing on whether he or she receives the death penalty.

A district court must give serious, careful consideration to any arguments under the Eighth Amendment. Capital cases involve some of the most important decisions that a judge will ever make. If confirmed, I would faithfully apply any

⁵ THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), available at http://www.pewtrusts.org/~media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf.

⁶ *Id.*

⁷ The American Civil Liberties Association, Race and the Death Penalty, <https://www.aclu.org/other/race-and-death-penalty> (Last visited June 13, 2018).

precedent from the Supreme Court and the Seventh Circuit under the Eighth Amendment.

- c. The color of the victim also plays an important role in determining whether the death penalty applies in a particular case. White victims account for about half of all murder victims, but 80 percent of all death penalty cases involve white victims. If you were a judge, and those statistics were playing out in your courtroom, what would you do?

I would faithfully apply the law on the admissibility of evidence about racial disparities, and follow the precedent from the Supreme Court and the Seventh Circuit.

If I believed that a U.S. Attorney's charging policies were leading to abuse or injustice, I would raise that issue with my colleagues in the judicial branch, including the Chief Judge. I would raise whether and how to express such concerns to the executive branch. I would ensure that any such action is consistent with the Code of Judicial Conduct.

If confirmed, I would do everything in my power to ensure that all criminal defendants receive a fair trial that comports with the law.

Questions for the Record from Senator Kamala D. Harris
Submitted August 29, 2018
For the Nominations of

Steven Seeger, to the U.S. District Court for the Northern District of Illinois

1. District court judges have great discretion when it comes to sentencing defendants. It is important that we understand your views on sentencing, with the appreciation that each case would be evaluated on its specific facts and circumstances.

a. What is the process you would follow before you sentenced a defendant?

I would follow the process set forth in Rule 32 of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3553, and faithfully apply precedent from the Supreme Court and the Seventh Circuit.

Specifically, I would review the Presentence Investigation Report, the defendant's sentencing submission, any materials submitted by the defendant, and any allocution by the defendant. I also would review the government's sentencing submission, any statements from the victims, and all other relevant material.

I would calculate the advisory range under the Sentencing Guidelines, and determine whether there is a basis for a departure. Then, I would consider each of the objectives of sentencing set by Congress. The goal would be to arrive at a sentence that is sufficient, but not greater than necessary, to comply with the purposes of sentencing. *See* 18 U.S.C. § 3553.

Throughout this process, I would listen carefully to the parties, study their submissions, and keep an open mind. I would make sure that the defendant has a full opportunity to be heard.

b. As a new judge, how do you plan to determine what constitutes a fair and proportional sentence?

I would carefully consider the decisions by other judges in comparable cases. Specifically, I would examine sentencing data in the Northern District of Illinois, as well as data from the nation as a whole.

c. When is it appropriate to depart from the Sentencing Guidelines?

The Sentencing Guidelines are advisory, not mandatory, so district courts may depart from them in appropriate cases. *See Booker v. United States*, 543 U.S. 220 (2005). The Sentencing Guidelines authorize departures from an advisory Guidelines range in certain circumstances, as explained in Part K of Section 5 of the Sentencing Guidelines. Also, district courts may impose sentences that are

outside the Guidelines range when they determine that such sentences are appropriate based on the sentencing objectives in 18 U.S.C. § 3553(a).

- d. Judge Danny Reeves of the Eastern District of Kentucky – who also serves on the U.S. Sentencing Commission – has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.¹**

i. Do you agree with Judge Reeves?

I understand that there are ongoing policy debates about the merits of mandatory minimum sentences. There are pending legislative reforms, too. Under the separation of powers, it is up to Congress – not district courts, let alone district court nominees – to decide the merits of any such reforms. *See* Code of Conduct for United States Judges, Canon 2; Canon 5.

- ii. Do you believe that mandatory minimum sentences have provided for a more equitable criminal justice system?**

Please see answer 1.d.i.

- iii. Please identify instances where you thought a mandatory minimum sentence was unjustly applied to a defendant.**

Please see answer 1.d.i.

- iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.² If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

1. Describing the injustice in your opinions?

Unjust sentences erode public confidence in the criminal justice system.

Under the separation of powers, a district court judge has an obligation to faithfully apply laws adopted by Congress, including

¹ <https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf>

² *See, e.g.*, “Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose,” NY Times, July 28, 2014, <https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html>

mandatory minimum sentences. The role of the judiciary is to say what the law is, not what it should be.

That said, in an exceptional case, it may be appropriate for a district court judge to call attention to the injustice of a sentence as applied to a specific defendant. Such attention may inform the legislative branch as it performs its constitutional functions under Article I.

2. Reaching out to the U.S. Attorney and other federal prosecutors to discuss their charging policies?

The Constitution vests charging decisions in the executive branch, not the judicial branch. As a result, it typically would not be appropriate to discuss charging policies with the Department of Justice, absent unusual circumstances (*e.g.*, ethical improprieties or prosecutorial misconduct).

If I believed that a U.S. Attorney's charging policies were leading to abuse or injustice, I would raise that issue with my colleagues in the judicial branch, including the Chief Judge. I would raise whether and how to express such concerns to the executive branch. I would ensure that any such action is consistent with the Code of Judicial Conduct.

3. Reaching out to the U.S. Attorney and other federal prosecutors to discuss considerations of clemency?

The Constitution vests decisions about clemency in the President, not the judiciary. That said, in an exceptional case, I would not rule out calling attention to the possibility of clemency.

e. 28 U.S.C. Section 994(j) directs that alternatives to incarceration are "generally appropriate for first offenders not convicted of a violent or otherwise serious offense." If confirmed as a judge, would you commit to taking into account alternatives to incarceration?

Yes. I am particularly interested in the Sentencing Options that Achieve Results ("SOAR") program in the United States District Court for the Northern District of Illinois.

2. Judges are one of the cornerstones of our justice system. If confirmed, you will be in a position to decide whether individuals receive fairness, justice, and due process.

- a. Does a judge have a role in ensuring that our justice system is a fair and equitable one?**

Yes.

- b. Do you believe that there are racial disparities in our criminal justice system? If so, please provide specific examples. If not, please explain why not.**

Yes. For example, my understanding is that African-Americans are arrested at higher rates, are charged more often, and receive longer sentences than whites who engage in comparable conduct.

3. If confirmed as a federal judge, you will be in a position to hire staff and law clerks.

- a. Do you believe that it is important to have a diverse staff and law clerks?**

Yes.

- b. Would you commit to executing a plan to ensure that qualified minorities and women are given serious consideration for positions of power and/or supervisory positions?**

Yes.